BIAS
IN ADMINISTRATIVE DECISION MAKING: FOCUSING ON LOCAL GOVERNMENT

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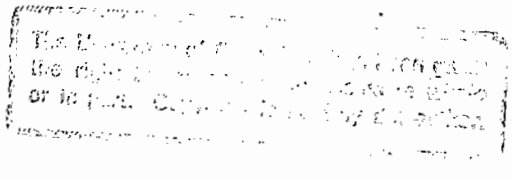

INTRODUCTION

The Centre for Local Government Training, Western Cape, has been running a training/orientation programme for local government councillors since the beginning of 1996. As part of this programme, I have had the opportunity to conduct the training of a basic module on local government and administrative law for several transitional local councils. From the numerous questions asked in this regard, it soon became clear that many councillors were uncertain as to when they had to recuse themselves from council meetings on the grounds of bias, or a possibility of bias.

Not surprisingly, as the test for bias in non judicial administrative decision making is far from clear, even to lawyers[1], many councillors appeared to have difficulty in applying the test to their personal circumstances. It is hoped that this dissertation, in shortened and simplified form, can serve as a practical guide to councillors in this regard. After all, prevention is better than cure, and any unnecessary court proceedings that can be avoided, will be saving the ratepayers thousands of rands.

At the outset, the rules of natural justice will be briefly discussed, as well as section 33 of the Constitution of the Republic of South Africa, no 108 of 1996. This will be followed by a detailed discussion of the rule against bias: including the test to be applied; the grounds for the appearance of disqualifying bias illustrated by a discussion of case law; the issue of departmental bias; the consequences of impermissible bias; and the doctrine of necessity. The focus will then move to local government, and the relevant legislation as expounded by the courts. Finally, the consequences of a biased decision in local government will be looked at, and the constitutionality of certain sections of the local government ordinances questioned.

2. THE RULES OF NATURAL JUSTICE

> "*[There are] fundamental principles of equity and justice which [are] or ought to be, basic to every civilised legal system. These principles are also known as the rules of*

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[1] The question of the correct test for bias, whether "reasonable suspicion" or "real likelihood" will be discussed in greater detail in section 3.2 below.

natural justice."[2]

The rules of natural justice are thus procedural rules that ensure fairness in decision making. They are universally accepted[3], and, according to Wade[4], can be traced back to medieval precedents in English common law[5], and even to the ancient world. It is generally accepted that these rules consist of two fundamental rules: audi alteram partem (to hear the other side) and nemo iudex in sua causa[6] (no one shall be a judge in his own cause), which, over time, has also become known as the rule against bias. Initially these rules operated only in the decision making processes of courts of law[7]. Over time, their sphere of operation extended to include decision making by administrative bodies. This process was probably assisted by the fact that in England, the administration was in the hands of justices of the peace for a long time.[8]

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[2] Trengove J in *Deputy Minister of Agriculture and another v Heatherdale Farms (Pty) Ltd and another* 1970 (4) SA 184 at 186, as quoted by Cockram, G in Administrative Law. Juta: Cape Town, 1976, on page 42.

[3] In one of the few expositions of customary administrative law in South Africa, Prinsloo, MW in Die Inheemse Administratiefreg van 'n Noord-Sothostam. UNISA: Pretoria, 1981 states that the rule against bias is also well known and applied by the tribal chief in decision making - whether judicial or administrative. The applicable maxims are *selepe se se madi ga se itheme* (a bloody axe does not cut itself) and *moreku ga o ithekole* (a doctor does not examine himself.) (at p 65) (Own translations from the Afrikaans translations provided.) He refers to several cases where the chief recused himself when he was personally involved in a matter, and had the matter heard before a neighbouring chief.

[4] Wade, HWR in Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 417.

[5] However, De Smith, SA in Judicial Review of Administrative Action. Stevens & Sons: London, 1968 at 231 - 233 concluded that the principles of the rule against bias were in fact canon law rules, and not directly incorporated into common law until the 1860's.

[6] Also stated as *nemo iudex in causa sua, nemo iudex in propria causa, nemo debet esse iudex in propria sua causa,* and *nemo iudex in causa sua potest.*

[7] Garner, JF in Administrative Law. (6th ed.) Butterworths: London, 1985 at 137, referring to Marshall, HH in Natural Justice. 1959.

[8] Pollard, D in Constitutional and Administrative Law. Butterworths, London, 1990 at 409.

Under English common law, the rules of natural justice are only applicable to administrative decision making that is quasi judicial, and not to decisions that are purely administrative in nature. (The basis appear to be the doctrine of the separation of powers and the sovereignty of Parliament - which leads to the courts being reluctant to interfere with the actions of the administration, especially where Parliament had seen fit to grant extensive powers to the administrators.) This division between insisting on fairness in quasi judicial decisions, but keeping a "hands off" approach in purely administrative matters, was followed by the South African courts for a very long time. It resulted in some very unfair administrative actions being upheld where the question in issue was held to be of a "purely" administrative nature. More over, the courts never quite succeeded in drawing a clear line between what was to be regarded as quasi judicial, and what purely administrative. Fortunately this unsatisfactory situation improved greatly when Corbett J held in *Administrator Transvaal v Traub*[9] that the distinction between quasi judicial and purely administrative action did not assist in that case, and set aside a decision made without affording the affected parties a hearing, despite argument presented by the Administrator that the matter was purely administrative in nature, and therefore not open to scrutiny by the courts.

With the abolishment of Parliamentary sovereignty on 27 April 1994, and the introduction of constitutional supremacy and a justiciable bill of rights, the courts received the go ahead to review all administrative action. Section 33 of the Constitution of the Republic of South Africa Act, no 108 of 1996 (the Constitution) provides as follows, under the heading "Just administrative action":

> "(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons*".

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[9] 1989 (4) SA 731 A. In issue was the non renewal of contracts or non appointment of medical doctors as senior house officers in conflict with a thirty year old tradition of automatic appointment on recommendation by their heads of department. They did not have the opportunity to be heard before the decision was taken.

Section 33(3) provides that national legislation must be enacted to give effect to the above, whilst item 23(2)(b) of Schedule 6 provides that, until such time as the relevant legislation had been adopted, the sections are to be regarded to read as follows:

> "*Every person has the right to -*
>
> *(a) lawful administrative action where any of their rights or interests is affected or threatened;*
>
> *(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;*
>
> *(c) be furnished with reasons in writing for administrative action which affect any of their rights or interests unless the reasons for that action have been made public; and*
>
> *(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.*[10]"

It can be accepted that procedural fairness includes compliance with the rules of natural justice, now also commonly referred to as the duty to act fairly[11] (to distinguish administrative decision making processes from that of the courts[12]). Its equivalent in United States law, the "due process" concept, had long been firmly enshrined in the US Constitution. Even though the right to administrative justice can still be called "a right under construction"[13], the constitutional protection of the duty to proceed fairly is to be welcomed.[14]

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[10] This is in all material aspects the same wording as used in section 24 (Administrative justice) of the Interim Constitution, no 200 of 1993.

[11] While the question has apparently been raised whether the duty to act fairly is part and parcel of natural justice or a distinct concept by Taylor, GDS in (1977) 3 *Monash University Law Review* 191, this issue is shrugged off as "barren discussion" in Administrative Justice - Some Necessary Reforms, the 1988 report of the Committee of the Justice-All Souls on Review of Administrative Law in the United Kingdom, at 158.

[12] Garner, JF and Jones, BL in Garner's Administrative Law. (6th ed.) Butterworths: London, 1985 at 137.

[13] Klaaren, J *Administrative justice in the constitutional order with special reference to local government* in Gutto, SB's A Practical Guide to Human Rights in Local Government. Butterworths: Durban, 1996 on 82.

[14] The question of whether section 33 (as read with item 23 of Schedule 6) of the

In South Africa, there are numerous writings on the *audi alteram partem* rule. Although a considerable number of cases had been reported on the rule against bias, juristic writings other than in text books on this topic are extremely scarce. It may be that this situation can be explained by the following quote from Boulle, Harris and Hoexter[15]:

> "... *the nemo iudex principle is fairly clear in both its meaning and its application, whereas the audi alteram partem maxim is the subject of considerable judicial controversy.*"

However, what may be clear to lawyers, is not necessarily clear to the layman. Under these circumstances, the focus of this dissertation would now be on the rule against bias.

3. THE RULE AGAINST BIAS

3.1 INTRODUCTORY REMARKS

The underlying reason for the rule against bias is, in the often quoted and almost immortal words of Lord Hewart CJ, that

> "[it] *is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seen to be done.*"[16]

Whilst the above statement was made in the review of judicial proceedings, it has since also been quoted and applied in the review of administrative action. The basis of the applicability of the rule in these cases is founded on two principles of good administration, namely that an unbiased and impartial adjudicator is more likely to come to a good decision than otherwise, and that it is paramount that the community must have faith in the process of decision

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Constitution merely constitutionalizes the common law or not, falls outside the scope of this dissertation. The answer will clearly determine the route a matter is to take - whether to the Supreme Court of Appeal or the Constitutional Court. I will not venture to resolve this problem.

[15] In Constitutional and Administrative Law - Basic Principles. Juta: Cape Town, 1989, at 322.

[16] R v Sussex Justices: Ex parte McCarthy [1924] 1 KB 256 at 259.

making.[17] An administrative decision maker must thus discharge her statutory duties honestly and impartially, without prejudice or interest.[18] Affording an affected party a hearing would be of no use if the adjudicator does not keep an open mind in the consideration of the issue due to the presence of bias.[19]

Two forms of bias can be found: actual bias and perceived bias, or the appearance of bias. Actual bias, by nature of its subjectivity, is obviously much more difficult to establish than perceived bias. In the words of Pollard and Hughes[20]:

> "....*in practice no administrator or magistrate is going to be silly enough to provide evidence of actual bias.*"

However, should actual bias be proved, the decision would not stand. In practice cases of actual bias are rare, and these are more often challenged on the grounds that irrelevant circumstances were taken into account or relevant ones ignored, or that there was an improper purpose, or even that the body concerned failed to apply its mind to the matter.[21]

Far more common are cases where there *appeared* to be bias, regardless of whether or not the decision maker was in fact biased. This brings us to the question of what the test is to establish impermissible perceived bias.

3.2 THE TEST FOR BIAS

3.2.1 ENGLISH LAW

In English law, no clarity is found on the test for bias. Two tests, either that of a "reasonable

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[17] Boulle L, Harris B & Hoexter C in Constitutional and Administrative Law - Basic Principles. Juta: Cape Town, 1989 at 322.

[18] Meyer, J in Local Government Law (Volume 1 - General Principles). Butterworths: Durban, 1979 at 137.

[19] Wiechers, M in Administratiefreg. (2nd ed.) Butterworths: Durban, 1984 at 242.

[20] Constitutional and Administrative Law - Text and Materials. Butterworths: London, 1990.

[21] Garner, JF and Jones, BL in Garner's Administrative Law. (6th ed.) Butterworths: London, 1985 at 138.

suspicion" of bias, or "a real likelihood" of bias, are applied. According to Wade[22], in the great majority of cases the two tests will lead to the same result. However, if "likelihood" is interpreted as "probability", a different finding can occur, since the possibility of bias is clearly not the same as the probability thereof. Wade[23] illustrates this difference by referring to the well known case of *Dimes v The Proprietors of the Grand Junction Canal*[24]. In this case, the Lord Chancellor had affirmed a number of decrees made by the Vice-Chancellor in favour of a canal company of which the Chancellor was a shareholder. These decrees were set aside by the House of Lords on the basis of pecuniary interest. (Although on appeal of the merits, the decrees were affirmed.) In this case there was no probability of bias, but a mere possibility, which was held to be sufficient to have the decrees set aside.

De Smith[25] submitted that, as far as the two tests are inconsistent, the "real likelihood" test is to be preferred, since the reviewing court should make an objective determination, on the basis of the evidence before it, whether there was a real likelihood of bias. He described a "real likelihood" of bias as at least a substantial possibility of bias.

In a 1968 decision of the English Court of Appeal in *Metropolitan Properties (F.G.C.) Ltd v Lannon* [1969] 1 Q.B. 577 Lord Denning court held that

> *"it does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit"*[26]. Later in the judgement, he

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[22] Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982. at 431.

[23] See previous footnote.

[24] (1852) 3 H.L.C. 759.

[25] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 246.

[26] As quoted by Beatson, J and Matthews, MH in Administrative Law Cases and Materials. Clarendon Press: Oxford, 1989 at 284-285.

went on to further interweave the two tests, leaving doubt as to what he really held to be the correct test to be applied.

This had the effect that, in more recent English cases, the courts still applied both tests, showing that they did not felt that the position was clear. According to Wade, both tests are still operating concurrently in England.[27]

3.2.2 SOUTH AFRICAN LAW

The uncertainty between the "reasonable suspicion" and the "real likelihood" tests of bias, as found in English law, also made its way into our law reports. In the case of *City and Suburban Transport (Pty) Ltd v Local Road Transportation Board*[28], Greenberg J stated the criteria by which the court was to determine the existence of impermissible bias, as follows:

> "*The test appears to be whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased.*"[29]

It appears that the judge had two distinctive tests in mind.

Rumpff JA in *S v Radebe*[30] dismissed the divergence in views in English law as a mere "huishoudelike geskil" (domestic dispute), preferring to fall back on Roman Dutch law where no such semantic differences existed. Stating that the principle in Roman Dutch law was clear, he held that:[31]

> " ... *'n Regter by die beoordeling van 'n saak uitgesluit word wanneer nie alleen eie belang, maar ook 'n neiging of gesindheid ten opsigte van een van die partye, hom*

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[27] Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 432.

[28] 1932 WLD 100, as quoted by Baxter, L in Administrative Law. Juta: Cape Town, 1984, at 558.

[29] at 106.

[30] 1973 (1) 796 A at 811, as quoted by Baxter, L in Administrative Law. Juta: Cape Town, 1985 at 559.

[31] at 812 A-C.

anders sou kon laat oordeel as wat die onpartydigheid eis, sodat daar rede bestaan, nieteenstaande die Regter se eie voorneme, om vir partydigheid aan sy kant te vrees."

(Own translation: A judge is excluded from adjudicating a matter when not only personal interest, but also an inclination or attitude relating to one of the parties could lead him to decide otherwise than required by impartiality, so that there exists reason, despite the judge's own intentions, to fear partiality on his side.)

The above *dictum* clearly favours the "reasonable suspicion" test, although the judge did not refer to it as such.

Baxter[32] stated that the requirement of a "real likelihood of bias" is an objective standard, while the "reasonable suspicion" test only concerns impressions. The first is substance, the other, appearance. He argued further that the "real likelihood" element of the test is a qualification designed to exclude far fetched suspicions, or a mere possibility of suspicion of bias, since these standards would not be practical to apply. He combined the two tests to suggest the following formulation:

"*Disqualifying bias will be found to exist where the reasonable lay observer would gain the impression that there is a real likelihood that the decision maker will be biased.*"

Boulle, Harris and Hoexter[33] found Baxter's test to be a neat combination of the two tests, and preferable since it affirmed that appearances are just as important as reality. The test was also applied in *Jeffery v President, South African Medical and Dental Council.*[34]

In the case of *Mönnig and others v Council for Review and others*[35] the question of the correct test to be applied came under judicial scrutiny once again, in somewhat unusual

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[32] Administrative Law. Juta: Cape Town, 1985 at 560-561.

[33] Constitutional and Administrative Law - Basic Principles. Juta: Cape Town, 1989 at 324.

[34] 1987 (1) SA 387 C.

[35] 1989 (4) SA 866 C.

circumstances. The facts were as follows: The three applicants were doing their national service, in clerical capacities, at the Castle in Cape Town. Together with S, who worked in the intelligence section, they met regularly during tea breaks, and then debated political issues, amongst other matters. One day they found out that the South African Defence Force (SADF) was waging a campaign to discredit the End Conscription Campaign (ECC). The second respondent was of the opinion that it was an unlawful campaign directed against a legitimate organisation, and together they decided to expose the campaign. However, S reported all their activities to his superior officer, and a trap was set. When S handed secret SADF documents to the applicants, they were arrested. They were court martialled on charges of having conspired to disclose protected information to unauthorised persons. All three were convicted and sentenced to 18 months' detention.

At the court martial, which was composed of senior officers of the SADF, the second respondent based his defence on the justification of private defence. (Otherwise unlawful action is justified to defend the interests of oneself or another against an unlawful attack[36].) He argued that he had acted to protect the interests of the ECC against the unlawful SADF campaign. This defence therefore necessitated the members of the court martial to decide on the legality of a SADF policy. As the second respondent had serious doubts about the impartiality of the court martial in this regard, he objected to being tried by that body and asked for the recusation of its members. They refused to do so. As required by the Military Disciplinary Code, the convictions were confirmed by the Council of Review, although the sentences were reduced. An application for the review of the Council of Review's decision was then brought to the Cape Provincial Division.

Conradie J, delivering the judgement of the full bench, analysed the English law on the test for bias. He then rejected Baxter's test for bias, saying that:

> "*I do not believe that this test correctly states the present South African law. Our Courts have not, in the last 20 years or so, regarded it as necessary for disqualifying bias to exist that a reasonable observer should suspect that there was a real*

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[36] See Van der Leeuw, G *Courts Martial, Judicial and Administrative tribunals, and the Rule against Bias*, in 1993 (110) SALJ. 430 at 432.

> *likelihood of bias; provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker."*[37]

The judge was thus clearly in favour of the "reasonable suspicion" test. However, he went on to say that that does not mean that the "real likelihood" test must be jettisoned in all circumstances. He suggested that it should still be used to determine disqualifying impartiality of administrative bodies which are "*known and expected by the reasonable layman to have an institutional or, as it is sometimes called, departmental bias.*"[38], or where the litigant appointed the tribunal himself[39]. Referring to De Smith[40], Conradie J used as examples the case where an administrative body is empowered to make a provisional decision and then hear representations against it; or that of an arbitrator appointed by agreement but employed by one of the parties to a dispute. Under these circumstances, the judge suggested, there must be a probability of (actual) bias before the courts would interfere. Since Conradie J clearly did not find the court martial to fall into one of these categories where the "reasonable suspicion" test should not operate, these remarks were made obiter, and can not be considered to be binding.[41]

The learned judge went on to say that

> "*in the case of non-judicial officers performing functions indistinguishable from the judicial process, the* [reasonable suspicion] *test operates even more strictly than in the case of judicial officers. Reasonable litigants are less likely to regard judicially trained officers as inclined to succumb to outside pressures or to be influenced by anything other than the evidence given before them. The quality of impartiality is not*

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[37] at 879 A.

[38] at 879 G-H.

[39] at 880 A and 881 J.

[40] Judicial Review of Administrative Action. (4th ed.) at 253.

[41] The issue of departmental bias would be discussed in more detail in section 3.3.3 below.

so readily conceded to non-judicial adjudicators.

Since the appearance of impartiality has to do with the public perception of the administration of justice, it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others."[42]

He then suggested that tribunals which have all the attributes of a court of law, such as the court martial, are the most vulnerable to the suspicion of bias. He held that the court martial members were being placed in an intolerable position, having to pronounce on the legality of a highly sensitive project. Since they had spent most of their working lives in the SADF, and could be supposed to be loyal to it, a reasonable person could reasonably have thought that there was a high risk of an unfair determination.[43] The proceedings of both the court martial and the Council of Review were accordingly set aside.

The matter was taken on appeal, in *Council of Review, South African Defence Force, and others v Mönnig and others*[44]. The court, per Corbett CJ, did not find it necessary to make a final determination on the correct test to be applied for disqualifying bias, since it was satisfied with the finding of the court *a quo* that the court martial did not pose the correct test when deciding the issue of their recusal, and that the risk of an unfair determination was unacceptably high.[45]

The issue - at least with regard to administrative tribunals with all the attributes of a court of law - was finally settled in *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Worker's Union and another*[46]. Here the facts were as follows: The majority of BTR's employees were members of MAWU. From August 1983 to May 1985 the parties were involved in negotiations over a recognition agreement. These negotiations were protracted

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[42] at 880 D - E.

[43] at 881 D and H-I.

[44] 1992 (3) SA 482 A.

[45] at 490 E - F.

[46] 1992 (3) SA 673 A.

and acrimonious, interspersed with periods of industrial action by the employees. Finally, in May 1985, 890 striking workers were dismissed by BTR. Throughout these negotiations BTR used a firm called Andrew Levy and Associates (ALA), industrial relations consultants, for advice on the process. In the words of the Hoexter JA "*ALA espoused the cause of BTR very zealously.*"[47] In October 1985 MAWU applied for a conciliation board in connection with the issues of the recognition agreement and the dismissal. The board sat on 26 February 1986. On 7 May 1986 certain disputes between the parties (regarding alleged unfair labour practices) were referred by the Minister of Manpower to the Industrial Court for determination. The court was presided over by the second appellant, R, and sat from 4 November 1986 until 9 September 1987, with an adjournment from 1 April 1987 to 29 June 1987. On 9 September 1987 the industrial court dismissed MAWU's applications.

During the adjournment of the dispute, on 26 May 1987, a one day seminar was presented by ALA. Eight papers were to be delivered: One by R, and four others by the three advocates and the attorney representing BTR at the trial. On seeing the advertisements for this seminar, and R's role therein, the attorneys for MAWU send a telex to R, objecting to his participation. R refused to withdraw from the conference, and subsequently delivered his paper. After the resumption of the trail, on 2 July 1987, MAWU formally applied for the recusal of R. This application was refused.

In an application for review of the proceedings of the Industrial Court to the Natal Provincial Division, Didcott J found it unnecessary to make a definite finding on the merits, since he held that R's refusal to recuse himself constituted a fatal irregularity. On appeal to the Appellate Division, it was decided to split the issues of merit and recusal, and the court only had to decide the latter.

Hoexter JA, delivering the judgement of the court (all four other members concurring), held that the nature of MAWU's complaint against R in support of their application for his recusal, was

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[47] at 682 F.

"The suspicion of bias assailing the minds of the members of MAWU was simply that, in all the circumstances of the case, by attending and addressing the seminar held on 26 May 1987, [R] *had so associated himself with one of the parties to the trial being heard by him as reasonably to create an impression of a leaning or inclination on his part towards one side in the dispute;* "[48]

The judge then proceeded to state that it was necessary for the purposes of the appeal to decide what the proper formulation is of the test for disqualifying bias. He concluded:

" *that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias.*"[49]

He held that such test reflected the recent trend in South African judicial thought, and that it is logical and fully in accord with sound legal policy. The reason for the test would be frustrated by the further requirement that the probability of bias must be foreseen.[50] He stressed, however, that the test was an objective one, subject to the hypothetical reasonable man test, and that

"*It is important, nevertheless, to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstitions or the intelligence of particular litigants.*"[51]

It is interesting to note that Hoexter JA held that the facts did not satisfy the "real likelihood of bias" test.[52] However, there was a reasonable suspicion of bias.

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[48] at 689 F - G.

[49] at 693 I - J.

[50] at 694 B - C.

[51] at 695 C - E.

[52] at 696 I.

Finally, he held that the nature of the dispute was crucial to a determination, and cited the following words of the *court a quo* with approval:

> " *....it is of great importance to take account of the sort of litigation that was involved here. It was not the ordinary sort. It was not a dispute over a liquor licence or a motor carrier permit or town planning permission. It was not a dispute in which the tensions and antagonisms, if any, were merely those which arise pro tem, ad hoc, for the time being, between people who find themselves on opposite sides of some such dispute.*"[53]

(In my opinion, this may be an indication that, had the adjudicator(s) of a town planning dispute attended a conference presented by one of the parties, there may well not have been a reasonable suspicion of bias.)

The appeal was accordingly dismissed.

The BTR decision can be welcomed, as it clearly spells out what the correct test is, and that it is an objective one. It is a pity that the judge did not venture an opinion on the retention of the "real likelihood" test in the circumstances set out by the Full Bench in the *Mönnig* case. However, this was hardly surprising, since the tribunal in question clearly was not one where departmental bias could be expected. However, Hoexter JA[54] referred with approval to an article by Professor E Mureinik[55], which criticised the investigation of the probability of bias since it would mean that the courts will have to consider the mind of the decision maker, and his ability to exclude the influence of bias from his thought processes - something that an appearance-orientated approach was designed to avoid. Under these circumstances, it seems that the intention was to scrap the "real likelihood" test.

Unfortunately, other than in the reference to the statement of the trial judge, quoted above, relating to liquor licences, motor carrier permits or town planning permission, the judgement makes no reference to administrative decision makers in general. It seems to focus on judicial

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[53] at 697 E - F.

[54] at 694 C - E.

[55] case note (1989) Annual Survey of South African Law. at 504 -5.Rose

officials - see, for instance the reference to Corbett CJ's judgment in *S v Malindi*[56] where the rule as to recusal, *as applied to a judicial officer*, (own emphasis) is given; or the statement that

> "*As a matter of policy it is important that the public should have confidence in the Courts.*"[57]

Is it as important that the public should have confidence in the Administration? Do the same tests apply, regardless of whether it is a purely administrative or a quasi judicial decision? Looking at past "purely administrative" decisions, it often appeared that public trust in the Administration was not always regarded as very important[58].

In *Rose v Johannesburg Local Road Transportation Board*[59] Lucas AJ, referring to the *dictum* of Lord Sumner in *Frome United Breweries Co v Bath Justices*[60] commented that

> "*Members of a board such as the respondent are under a duty to act honestly and this duty is not confined to mere abstinence from pecuniary corruption. They must use the impartiality and fairness which are characteristics of an honest judge.*"

From the above, it appears that the same tests that are applicable to judicial officers, should be extended to administrative decision makers. However, bearing in mind that our courts have, until *Administrator Transvaal v Traub*[61], steadfastly refused to interfere in "purely" administrative -, as opposed to quasi judicial- decision making, the matter is far from clear. Even in *Traub*, the court did not expressly hold that the distinction was to be discarded, but merely that it did not assist in that matter. It may be that Conradie J's attempt to retain the

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[56] 1990 (1) SA 962 A, quoted in *BTR* on 693 at D - I.

[57] at 694 E - F.

[58] See, for instance, *Yoffe v Koppies Licensing Board* 1948 (3) SA 743 O, and the discussion thereof in 3.3.1 below.

[59] 1947 (4) SA 272 W at 288-9.

[60] [1926] AC 586 at 615.

[61] 1989 (4) SA 731 A.

"real likelihood" test in certain administrative cases, once again amounts to a reluctance to interfere in some administrative actions.

Under these circumstances, it is a pity that the two most important and recent cases on the test for bias, *Mönnig* and *BTR*, both related to tribunals that amounted to courts of law in almost all material characteristics. One wonders if the same test would have been applied if the issue revolved around a hearing for parole, for instance, in stead of a court martial or the industrial court.

However, in view of the fact that administrative justice is now a fundamental right, it is submitted that, as far as possible, the same rules of procedural fairness, including the same test for disqualifying bias, should be applicable to all administrative decision making, whether judicial, quasi judicial or purely administrative. This will increase public trust in the administration, as well as the quality of administrative decision making. The test for impermissible bias should be one of appearance ("reasonable suspicion"), not one of substance ("real likelihood") which will entail investigating probabilities of actual - subjective - bias. (It is strange to note that most writers appear to regard the "real likelihood" test as objective, whereas it actually involves a greater degree of subjectivity than the "reasonable suspicion" one, since what stands to be determined is whether it is more probable that the decision maker was actually biased than not.) However, the issue of departmental or institutional bias is problematic and will be discussed in section 3.4 below.

3.3 THE GROUNDS FOR THE APPEARANCE OF BIAS

Normally, the circumstances which tend to create the appearance of disqualifying bias is classified into three broad categories, namely financial interest, personal interest, and prejudice. Provided the test for disqualifying bias is met, there is no reason however, to limit the grounds of disqualifying bias to one of these three grounds. According to Baxter[62] this classification only assists to highlight the relative significance of various forms of impermissible bias, and should not be treated as prescriptive hard and fast categories. From the cases, a number of subdivisions can be found under each of the above mentioned three

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[62] Administrative Law. Juta: Cape Town, 1984 at 561.

main categories. Each of these categories will now be considered and illustrated by reference to both South African and English case law.

3.3.1 PECUNIARY OR FINANCIAL INTEREST

"Money is thought to be too great a temptation for mere mortals to resist."[63]

It has always been accepted that, where a decision maker was shown to have a financial interest in any matter, the appearance of bias is such that the decision will be vitiated. It has often been held that the slightest pecuniary interest will disqualify the adjudicator from acting.[64] This has lead some writers to argue that the test for bias in these cases is stricter than in other cases. I'm in agreement with Baxter's[65] view that it is unnecessary to create such a distinction, as the cases can be read to the effect that even the smallest degree of financial interest will satisfy the test for the appearance of disqualifying bias. Normally, it is stated that any financial interest, whether direct or indirect, will disqualify the adjudicator.

3.3.1.1 DIRECT FINANCIAL INTEREST

These would be cases where the decision maker stands to gain directly by the decision. Bribery would amount to such direct financial interest, although, since this is also a crime, it is usually dealt with in criminal cases, and not as a ground for review. Examples of other forms of direct financial interest is rare.[66]

3.3.1.2 INDIRECT FINANCIAL INTEREST

These cases, where the decision maker is suspected of gaining a long term benefit, or a benefit

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[63] Baxter, supra, at 561.

[64] See, for instance, the quote from *Halsbury* in *Rose v Johannesburg Local Road Transportation Road*, 1947 (4) SA 272 W at 287.

[65] Administrative Law. Juta: Cape Town, 1984 at 562.

[66] In *Woods v East London Municipality* 1974 (4) 541 E the court held that the councillors had, in fact, a direct pecuniary interest where they passed a resolution to the effect that the council will pay the legal fees of a defamation case, whilst they would be entitled to any compensation awarded in terms thereof.

through some intermediary of which he is a member, are far more common.

One of the most famous cases on indirect financial interest is that of *Dimes v The Proprietors of the Grand Junction Canal*[67], which was discussed in section 3.2 above. The Lord Chancellor confirmed some decrees issued by the Vice chancellor in favour of a company in which he (the Chancellor) held shares. The House of Lords held that the Chancellor had been disqualified to act in this regard, and set aside the decrees.

Another English example is found in *R v Hendon R.D.C, ex parte Chorley*[68] where a councillor voted for a resolution granting permission to develop certain land which was subject to a provisional contract of sale. This contract was subject to the granting of the council's permission. The relevant councillor was the estate agent of the seller. The council's decision was set aside on the grounds of financial interest.

In South Africa, the law reports are filled with cases where local government councillors were held to be disqualified on the grounds of pecuniary interest. Some of these will be discussed in section 4 below. One of the leading cases in this respect is that of *Rose v Johannesburg Local Road Transportation Board.*[69] In this case, R sold his taxi company to Company A, which became the largest taxi operator in Johannesburg. R subsequently applied for a licence for "drive yourself" cars to the respondent board, whose members consisted of H, G and TH. The application was opposed by Company A. H was a director of three sister companies of Company A. R requested the recusal of H, which was refused. The court held that, as H was director of three companies in the same group as Company A, and the board had the power to grant or refuse valuable privileges (the certificates), the reasonable man would come to the conclusion that H's duty could reasonably conflict with his interest in the well being of the group of companies. H could be seen a business associate of Company A, a party in

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[67] (1852) 3 H.L.C. 759, as discussed in Beatson J and Matthews MH in Administrative Law - Cases and materials. Clarendon Press: Oxford, 1989 at 279 and further.

[68] [1933] 2 KB 696, as discussed in Beatson J and Matthews MH in Administrative Law - Cases and materials. Clarendon Press: Oxford, 1989 at 280.

[69] 1947 (4) SA 272 W.

competition with R. As a result of this appearance of pecuniary interest, the court held that H was disqualified and the decision of the board was set aside.

In *Yoffe v Koppies District Licensing Board*[70], two licensing board members were directors of a co-operative society carrying on business as general dealers. The court held that they were not disqualified to hear an application for a general dealer's licence. However, part of the ratio appeared to be that the normal rules relating to bias do not apply in non judicial proceedings[71]. The court find that the conjecture of bias was very vague, and dismissed the application. It is submitted that this decision is incorrect, especially in view of the decision in *Hack v Ventersdorp Municipality*[72], which will be discussed in section 4 below.

In *MM Security (Pty) Ltd v Bloemfontein Municipality and others*[73] it was contended that E, a member of a valuation court, whose firm acted as estate agents for a large number of the objectors to a new valuation roll, and who was also a shareholder or director of several objecting companies, should be completely disqualified from sitting on the court. The court held that the general interest E had as property owner would not disqualify him. In a city the size of Bloemfontein, the suggestion of bias was too vague and general to be a ground for recusal. (E had categorically undertaken not to adjudicate on any of the objections where he was directly or indirectly involved.) His extensive knowledge of the property market was held to be useful to the court, not a disqualification.

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[70] 1948 (3) SA 743 O.

[71] See at 751, where Van den Heever J stated that
> "the proceedings cannot be said to be judicial. In judicial proceedings it is essential not only that there shall be no bias or likelihood of bias in the mind of the tribunal, but it is important also that there shall be no reasonable suspicion on the part of the subject that the tribunal is biased. In administrative inquiries such as this the subjective mental reactions of the applicant cannot weigh so heavily."

[72] 1950 (1) SA 172.

[73] 1968 (2) SA 6 O.

In *Jacob v Tugela and Mapumalo Rural Licensing Board and others*[74] one of the members of the board deciding an application for a general dealer's licence was also a member of a club situated five miles from the applicants premises. Such club also had a general dealer's licence. The club's trading activities formed an unimportant part of its activities, and the court held the interest of any club member in the interference of these activities to be very slight. Furthermore, since the applicant failed to establish that the proposed business would constitute any real competition with the club, the interest of its members in this regard was held too remote to create any appearance of bias.

In summary: normally any indirect pecuniary interest will amount to disqualifying bias, unless the interest is too general, very tenuous or too remote.

3.3.2 PERSONAL INTEREST

Under appearance of personal interest falls family relationship, friendship, animosity, vocational or professional relationship, and that of employer/employee. Each of these will be briefly discussed.

3.3.2.1 FAMILY RELATIONSHIP

Rose Innes[75] stated that adjudicators were disqualified if their spouse, child or other close relative was a party to the proceedings to be adjudicated. The matter is well illustrated by *Liebenberg v Brakpan Liquor Licensing Board*[76] where the Brakpan mayor insisted, against advice, upon sitting as member of the local liquor licensing board when it heard competing applications, including one by the mayor's brother. The licence was granted to the brother. However, the decision was set aside on review, despite affidavits from the other board members that they were not influenced by the mayor's presence.

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[74] 1964 (1) SA 45 D.

[75] Judicial Review of Administrative Tribunals in South Africa. Juta: Cape Town, 1963 at 185.

[76] 1944 WLD 52.

In *S v Bam*[77] a magistrate adjudicated a matter against an accused charged with having kept cattle in contravention of regulations of the village management board. The magistrate's wife was the secretary of this board, and acted as state witness. The magistrate's refusal to recuse himself was found to be incorrect and the proceedings before him were set aside on review.

3.3.2.2 FRIENDSHIP

As with family relationships, amicable relationships can constitute a ground for appearance of bias. There is, unfortunately, no direct case in point in South African law. (This is probably due to the fact that those who have friends amongst adjudicators would not, under normal circumstances, publicise that fact.) In *Rose v Johannesburg Local Road Transportation Board*[78] (discussed above) Lucas AJ held that the fact that H, the chairman of the Board, held directorships in sister companies of an objector and competitor of the applicant, put him in the position of probably being an interested friend, but the case was decided mainly on the appearance of pecuniary interest.

In *South African Motor Acceptance Corporation (Edms.) Bpk v Oberholzer*[79] the appellant instituted proceedings against magistrate O for the payment of certain monies. The magistrate was one of only two magistrates for the district. The matter came before the other magistrate G, and the appellant requested his recusal, which was refused. On appeal, the court held that the appellant had a reasonable fear that, due to the collegial relationship between the two magistrates, the magistrate might have been in favour O, albeit unconsciously. The matter was referred back to be heard by another magistrate.

Wade[80] mentioned that an English justice was disqualified where he was a friend of the mother of one of the parties and that party had let it known that the justice would be on her side. De

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[77] 1972 (4) SA 41 E.

[78] 1947 (4) SA 272 W at 288.

[79] 1974 (4) SA 808 T.

[80] Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 435, referring to *Cottle v Cottle* [1939] 2 All E.R. 535.

Smith[81] listed an Australian case where the decision of a tribunal was set aside because one of its members was a personal friend of the applicant's husband.

3.3.2.3 ANIMOSITY OR HOSTILITY

The inverse of friendship, personal animosity or hostility on the side of the adjudicator against one of the parties is also a ground for disqualification. In *Pietersburg Club v Pietersburg Licensing Board*[82] one of the members of the board had previously been a member of the applicant club, but had been requested to resign. He showed considerable malice in his determination to have the club's licensing hours reduced. Although he refrained from voting, the court held that his presence was sufficient to invalidate the Board's decision to stop the sale of liquor after 18h30.

In *Rose v Johannesburg Local Road Transportation Board*[83] the court held that the other two board members, although not having any pecuniary interest, showed such strong feelings of animosity against the applicant that they should also not be allowed to sit on any future application of the applicant.

In *Foster v Chairman, Commission For Administration, and another*[84] the applicant had made accusations against C, amongst others, of corruption and tax evasion. C sat as a member of an evaluation committee which made a finding detrimental to the applicant. The court held that there was a reasonable suspicion of personal bias on the side of C, and set the decision aside.

In *Brink v Baston, Diedericks and Horak, NNO*[85] one of the grounds upon which a

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[81] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 249.

[82] 1931 TPD 217.

[83] 1947 (4) SA 272 W at 290.

[84] 1991 (4) SA 403 at 411.

[85] 1942 TPD 127, as discussed by Baxter, L in Administrative Law. Juta: Cape Town, 1984 at 566.

disciplinary conviction was quashed was that a police officer who adjudicated in a disciplinary matter might have been antagonistic towards the detective who was being charged because this detective had frustrated his efforts to trace the traitor, Robey Leibbrandt.

De Smith[86] mentions an Irish case where a conviction was quashed where there was proof that very bad feeling existed between him and the defendant's family, arising from the trespassing of a fowl. The same writer refers to a Canadian case where a magistrate was held to be disqualified from hearing a case against an accused with whom he had come to blows not long before.

3.3.2.4 VOCATIONAL OR PROFESSIONAL RELATIONSHIP

This can arise where the adjudicator has or had a professional or other vocational relationship with one of the parties. In South Africa, for instance, a judge can not hear a case in which he has previously acted as counsel to one of the parties.

According to De Smith[87], this will only constitute a ground for recusal if the relationship is directly related to the subject matter of the dispute. The best known case in this regard in English law is that of *R v Sussex JJ, ex parte McCarthy*[88], where the famous *dictum* of Lord Hewitt CJ (quoted in 3.1 above) originated. In this case, the acting clerk of the magistrates' court was a solicitor whose firm was representing the person who was suing McCarthy. The clerk retired with the justices when they considered their verdict. Although the clerk scrupulously refrained from saying anything, the court still set the conviction aside.

Another well known English case which could be classified under this heading is that of

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[86] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 247.

[87] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 250.

[88] [1924] 1 KB 256, as summarised by Pollard, D and Hughes, D in Constitutional and Administrative Law - Text and Materials. Butterworths: London, 1990 at 427.

Metropolitan Properties (F.G.C.) Ltd v Lannon[89]. Here a rent assessment committee determined the rent of a flat in Kensington at a figure below that asked even by the tenant. The chairman of this committee lived in a flat of which his father was the tenant, and of which the landlord was a company associated with the Kensington landlords. He had previously advised his father and other neighbours in rent proceedings against their landlord. The determination of rent was set aside.

Other examples raised by De Smith[90] are the following: an arbitrator in proceedings to which a government department was a party was, unknown to the other party, solicitor to that department; a justice was one of a small class of licensed river pilots and sat on a case where the defendant was charged with infringement of these river pilots' privileges. However, where the justice in divorce proceedings was a member of the same trade union as the husband, it was held not to affect the validity of the judgement.

3.3.2.5 EMPLOYER/EMPLOYEE RELATIONSHIP

According to De Smith[91] disqualifying bias can arise from the fact that the adjudicator is either the employer or employee of one of the parties, if their relationship is a close one, or if their respective interests are directly involved. In my opinion, this will very often amount to indirect financial interest, which is impermissible in any way. Obviously, where the other party is aware of these circumstances and consents thereto, the disqualification will not apply. Where legislation expressly empowers employers to make decisions regarding the rights of their employees, this restriction will also not apply.

3.3.3 PREJUDICE

Whenever an issue had been prejudged, or this appears to be the case, the decision will be

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[89] [1969] 1 QB 577, as discussed by Wade HWR in Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 425.

[90] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 250.

[91] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 251.

invalidated. Baxter[92] lists four instances where prejudice can spring from: the adjudicator's past activities, past relationship with the affected individual, current external commitments, or his manner of conduct during the proceedings. However, I would venture to classify the grounds as follows: Prosecutor turned adjudicator, past findings, previous support or opposition expressed for one of the parties, and the manner of conduct during the proceedings. Each of these will be discussed in turn.

3.3.3.1 PROSECUTOR TURNED ADJUDICATOR

In the century old words of Kotze CJ, it is "*contrary to every principle of fairness and justice*"[93] to have someone act as both prosecutor and judge in one case. According to Rose Innes[94] it must be shown that the tribunal identified itself with the prosecution of the matter before it will be disqualified. Examples listed by this writer include the following: *Ex parte Town Council of Smithfield*[95] where a member of a valuation court actively assisted in having a petition against an increase in rates signed and presented to the court. The decision to reduce the valuation of certain property was set aside; *Kirk v Wodehouse L.C.*[96] where a member of a licensing board participated in the resolution of another body of which he was a member to lodge an objection against the application for a licence, and was held to be disqualified. This is to be distinguished from the case of *Downard v Durban Liquor Board*[97] where the adjudicator was a member of a church objecting to the approval of a licence, but had no part in the decision to bring the objection. The fact that the legal adviser to the Medical and Dental Council prosecuted a medical practitioner before such council also did not identify the council with the prosecution to such an extent that it was disqualified from

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[92] Administrative Law. Juta: Cape Town, 1984 at 564.

[93] *The State v Nellmapius* (1886) 2 OR 121, at 129, as quoted by Baxter, L in Administrative Law. Juta: Cape Town, 1984 at 564.

[94] Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 177.

[95] 1919 OPD 73.

[96] 1924 EDL 297.

[97] (1904) 25 NLR 15.

acting.[98]

Allars[99] cites the example that where a person who received and reported the offer of a bribe enclosed with the nomination of dogs for a race, sat on a tribunal, even though he did not speak or vote, the proceedings were vitiated.

The general rule that a person who initiated proceedings is disqualified from adjudicating, does, however, not apply where legislation expressly authorises a body both to investigate and prosecute a matter. In *De Wet v Patch*[100] a prisoner was charged with failing to obey orders and treating the prison wardens with disrespect. The superintendent in charge of all the wardens prosecuted and presided at the hearing. Newham J held that the Prisons Act authorised a departure from the general rule and that the superintendent had been correct in prosecuting and presiding. (However, since the adjudicator made certain statements which indicated bias against the prisoner, the proceedings were set aside.)

The general rule is also not applicable to voluntary bodies, for instance the Jockey Club, whose rules specifically provide that a member of the committee adjudicating the dispute, may also testify as witness in the case[101]. This was confirmed in *Marlin v Durban Turf Club and others*[102] where the fact that the race steward gave evidence at the hearing was held to be in order, since it was not shown that the steward was not open to persuasion to reach a conclusion different from his own.

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[98] *SA Medical and Dental Council v McLoughlin* 1948 (2) SA 355 A.

[99] Introduction to Australian Administrative Law. Butterworths: Sydney, 1990 at 273, referring to *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

[100] 1976 (2) SA 316 R, as discussed by Cockram GM in Administrative Law. Juta: Cape Town, 1976 at 44-45.

[101] Rose Innes LA in Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 178-179.

[102] 1942 AD 112.

3.3.3.2 PAST FINDINGS

This can play a role where an administrative body has made a preliminary finding, followed by a hearing, or where a decision was taken and the body must then hear an appeal against it, or where a previous decision was set aside by a court and the matter is referred back for redecision. The main issue to be considered is whether the body concerned will rehear the matter with an open mind. In most cases, it is expected that public officials are capable of recognising their own error.[103] In an Australian case an applicant alleged that it was unfair that the same tribunal, the Australian Broadcasting Tribunal, albeit with different members, both investigated and adjudicated a matter. The court rejected the argument that, in such cases, there was a built in tendency to support the decisions of other members of a collegiate body.[104] However, where there is a clear predisposition against the individual, this will be seen as disqualifying bias, and the court will interfere. For instance, in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*[105] where the JSE committee failed to comply with their own rules in protection of a minority shareholder, and argued that the court had no powers to review their proceedings, the court substituted their decision by its own.

Wade[106] cites the case of *R v Kent Authority ex parte Godden*[107]. The police authority, when considering whether to compulsory retire an officer on grounds of mental health, had to refer the matter to a qualified doctor. They referred the relevant officer back to a doctor who had examined him the previous year and had reported that he was suffering from mental disorder. The court held that the doctor had a duty to act fairly, and could not do so if he had committed himself to an opinion in advance of the enquiry.

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[103] Baxter L in Administrative Law. Juta: Cape Town, 1984 at 565.

[104] *Casey v Australian Broadcasting Tribunal* (1988) 16 ALD 680, as discussed by Allars M, in Introduction to Australian Administrative Law. Butterworths: Sydney, 1990 at 273.

[105] 1983 (3) SA 344 W.

[106] Administrative Law. (5th ed.) Clarendon Press: London, 1982 at 425.

[107] [1971] 2 QB 662.

3.3.3.3 PREVIOUS EXPRESSIONS OF SUPPORT OR OPPOSITION

Should a decision maker, prior to a hearing, or during a hearing, express an opinion as to how the matter should be decided, or states that he will vote in favour or against a matter, he will be disqualified from adjudicating thereon.[108] This is clearly illustrated by the case of *Patel v Witbank Town Council*[109] where the mayor announced that he "would move heaven and earth" to prevent an Indian from acquiring a general dealer's licence. The subsequent decision to refuse such a licence, was set aside.

In *AECI Ltd and another v Strand Municipality and others*[110] it was alleged that the Administrator had previously committed himself to expropriating the applicants property. The applicant presented *prima facie* evidence to the court that the minds of those in the Provincial Administration had been made up prior to the applicant's objections to the expropriation were lodged. In the circumstances, the court referred the application for oral evidence in this regard.

Unfortunately, the ultimate result is not reported. However, it is submitted that, should the applicant have been able to submit evidence that the Administrator had so committed himself to the expropriation that he was unable to reconsider the objections with an open mind, the decision would have been set aside. The doctrine of necessity, which will be discussed in 3.8 below, may also have played a role.

In *R v Halifax JJ, ex parte Robinson*[111] an English court invalidated a decision to refuse a liquor licence where the judge, a proselytising teetotaller, declared that he would have been a traitor to his principles if he had voted for the approval of the licence.

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[108] Rose Innes LA in Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 180.

[109] 1931 TPD 284.

[110] 1991 (4) SA 688 C.

[111] (1912) 76 J.P 233, as discussed by De Smith SA in Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London 1968 at 248.

3.3.3.4 MANNER OF CONDUCT DURING PROCEEDINGS

According to Baxter[112], the appearance of prejudice can arise in a number of ways. For instance, the hearing may take place in "partisan" territory, which may lead one party to believe that the other has an unfair advantage. In *Schoeman v Administrateur (OVS)*[113] the hearing of an application for the diversion of certain roads was due to be held on the applicant's farm. An interdict was granted to prevent this, since the location of the hearing created an appearance of bias.

Another form of apparent prejudice can occur where irrelevant information detrimental to the affected party is placed before the tribunal, since this may cause decision makers to become prejudiced against him.[114]

Yet another example is where one of the interested parties is allowed to attend the deliberations of the decision makers, as this creates the suspicion that she continues to exert influence over them. One example is that of *R v Sussex Justices, ex parte McCarthy*[115] (also discussed in 3.3.2 above), where the solicitor clerk retired with the judges. Yet another is *Cooper v Wilson*[116] where a police constable was dismissed by the Chief Constable of Liverpool. His appeal against dismissal was rejected by the Watch Committee. However, the Chief Constable was present when the Watch Committee decided the appeal. This was held to constitute an irregularity which invalidated the appeal proceedings.

The above are some examples of when the appearance of bias was held to be sufficient to

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[112] Administrative Law. Juta: Cape Town, 1984 at 567.

[113] 1961 (4) SA 856 O.

[114] *Schoultz v Voorsitter, Personeel Advies-komitee van die Munisipale Raad van George* 1983 (4) SA 689 C.

[115] [1924] 1 KB 256.

[116] [1937] 2 KB 309, as discussed by Wade HWR in Administrative Law. (5th ed.) Clarendon Press: London, 1982 at 424-425.

invalidate proceedings. It must, however, be remembered that a line must be drawn between genuine and far-fetched cases. Wade[117] mentions the often quoted example that a justice of the peace who subscribed to the society for the prevention of cruelty to animals, would not be disqualified from hearing a prosecution instituted by the society. Here the appearance of bias is too general and too remote.

3.4 OFFICIAL OR DEPARTMENTAL BIAS

> "*The interest or enthusiasm which an official or tribunal may have for the discharge of their functions and for the object or purpose at which those functions are directed is not bias.*"[118]

According to Boulle, Harris and Hoexter[119] departmental bias, unless accompanied by another form of disqualifying bias, is acceptable. They refer to the case of *Crow v Detained Mental Patients Special Board*[120] where the applicant alleged that one of the doctors on the board had "preconceived ideas and a closed mind" when deciding on his release from a special prison. Ebrahim J held that the doctor's very enthusiastic approach to his duties did not amount to disqualifying bias.

In *Foster v Chairman, Commission for Administration, and another*[121] the applicant made allegations of corruption and tax evasion against members of the department. The matter was initially investigated by his immediate superior, H, and two of H's superiors, A and V. These three gentlemen later formed part of a 22 member evaluation committee which found that the applicant was "not a candidate for promotion". This finding ended all prospects the applicant

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[117] Administrative Law. (5th ed.) Clarendon Press: London, 1982 at 422.

[118] Rose Innes LA in Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 177.

[119] Constitutional and Administrative Law - Basic Principles. Juta: Cape Town, 1989 at 326.

[120] 1985 (4) SA 83 ZH.

[121] 1991 (4) SA 403 C.

might have had regarding further advancement in the department. The applicant alleged bias on the part of H, A and V. The court held that any bias that they might have shown, could be described as no more than departmental bias, which was acceptable. (This was distinguished from the type of (possible) bias that C, one of the people whom the applicant accused of corruption, who also sat on the committee, had, which was held to be disqualifying.)

Baxter[122] states that it is inevitable, and even necessary for good administration, that government departments will uphold their policies, and in a sense this can be taken as bias against any individual that wants them to deviate from such policies. However, as long as an official keeps an open mind to decide individual matters before him, and stays fair minded, impartial and willing to re-examine the facts, this form of bias is not impermissible. Unfortunately, the courts have tried in the past to resolve this question by labelling all such decisions as "purely" administrative, and therefore not open to review.[123] As set out in 3.2 above, in my opinion the artificial classification of administrative action into judicial, quasi-judicial or purely administrative, has outlived its usefulness; and based on the constitutional right to just administrative action, the courts must review all administrative action that is unfair.

As mentioned in 3.3.3 above, the general rule that a prosecutor may not be a decision maker, does not apply where legislation expressly provides otherwise. This could also be regarded as a form of acceptable official bias.

In England, the leading case on institutional bias is that of *Franklin v Minister of Town and Country Planning*.[124] Here the Minister of Town and Country Planning selected Sevenage as the first site under the New Towns Act, 1946. There existed strong opposition to this policy, and a ministry inspector heard the objections at a public inquiry. The statute required that the

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[122] Administrative Law. Juta: Cape Town, 1984 at 567.

[123] Baxter. L in Administrative Law. Juta: Cape Town, 1984 at 567, footnote 200.

[124] (1948) AC 87, as discussed by Wade HWR in Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 437-438.

Minister had to consider the report of this inspector. Before the report was finalised, however, the Minister visited Sevenage, and in a public speech stated that the selection was final. It was alleged that the Minister had prejudged the issue and therefore precluded himself from giving fair and unbiased consideration to the inspector's report. Three courts subsequently reached different conclusions: The High Court held that impartial consideration was required, and not given. On appeal, the Court of Appeal also held that impartial consideration was required, but that it had been given. On a further appeal, the House of Lords held that the law did not require impartial consideration at all: the Minister was free to be biased, provided he followed the procedure in the Act. Wade[125] submits that the decision of the Court of Appeal is the correct one. A Minister must have policies and advocate them. The crucial issue is, however, whether, when it comes to decision making, the Minister genuinely approaches the issue with a mind that is open to persuasion.

The issue of departmental bias arose again in South Africa in two fairly recent cases involving prison officials: The first was *Loggenberg and others v Robberts and others*[126] Here the applicants were prison warders, and members of the Police and Prisons Civil Rights Union (POPCRU), who participated in a strike. The strike was called to highlight the lack of attention the authorities gave to their complaints of discrimination and injustices between black and white warders. A subsequent disciplinary hearing was presided over by R, a colonel who only assumed duties at the relevant prison after the strike was over. The applicants requested the recusal of R, on the grounds that he was a member of the class in whose favour discrimination had operated, and because of his position at the prison was seen to be personally biased against the applicants. Van den Heever J held as to the first ground, that, since the regulations prescribed that only an officer could preside over the hearing, it amounted to institutional bias that had to be tolerated. Since R was not present at the prison during the strike, the argument of personal bias did not succeed either, and the application for recusal was refused.

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[125] Administrative Law. (5th ed.) Clarendon Press: London1982 at 437.

[126] 1992 (1) SA 393 C.

The second case was the matter of *Dumbu and others v Commissioner of Prisons and others.*[127] The facts preceding the disciplinary hearing were similar to those in *Loggenberg*. Here, the disciplinary hearing was presided over by T, a major and head of the region's personnel department, and, according to the applicants, one of the persons whose conduct gave rise to the strike. The applicants requested the recusal of T, which was refused. On review, the court held that

> "*the proper approach is to apply the wider test of reasonable suspicion to its full extent in every case where bias or self-interest is the issue unless there is a statutory exclusion or curtailment.*"[128]

The court accepted that the facts that the presiding officer had to be a commissioned officer in the Prisons Service, and had to make sufficient prior investigations to formulate a charge, generated a measure of departmental or institutional bias, and found that, if this was the only bias alleged, the "real likelihood" or probability test was appropriate. However, here the suspected bias was of a different nature, since the presiding officer was reasonably perceived to be a judge in his own cause with reference to the merits of the enquiry. The decision of T not to recuse himself, was accordingly set aside.

The question of what the test for disqualifying departmental bias is, remains. In both the last mentioned cases, *Loggenberg* and *Dumbu*, the view proposed by Conradie J in *Mönnig and others v Council of Review and others*[129], namely that in cases where departmental bias was to be expected, the "real likelihood" test should be applied, in contrast to the "reasonable suspicion" test, appears to have met with approval.

However, Van der Leeuw[130] submits that the use of the probability test would not, in fact,

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[127] 1992 (1) SA 58 E.

[128] at 63 E-F.

[129] 1989 (4) SA 866 C, discussed in detail in 3.2 above.

[130] *Courts Martial, Judicial and Administrative Tribunals, and the Rule against Bias* in (1993) 110 SALJ. 430 at 436 and further.

take the matter any further, since in many cases the answer would still be in the affirmative, without necessarily disqualifying the tribunal. He suggests that the test for administrative tribunals (as opposed to judicial tribunals) should be a two-step inquiry: the initial inquiry should look at the nature of the alleged bias, namely whether it is permissable or not. Departmental bias would be deemed to be permissable. If the alleged bias is of an impermissible kind, the test should still be the "reasonable suspicion" kind. Where, however, the bias appears to be permissable and is proved to exist, the question arises whether it is within acceptable limits, or whether the tribunal has unlawfully fettered its own discretion. (Failed to keep an open mind on the issue.)

The last enquiry as proposed by Van der Leeuw, thus includes the question of the unlawful fettering of discretion, which is traditionally dealt with as a ground for *ultra vires*, and combines same with one of the procedural requirements for fair play. However, this is not completely strange: it has previously been mentioned that challenges on the grounds of actual bias is rare, since these are ordinarily dealt with *ultra vires* grounds such as irrelevant consideration or ulterior purpose. The distinction between what is lawful and what is fair therefore does not appear so absolute as to be unable to be bridged.

In the *Dumbu* case, the court in effect appeared to have applied the test proposed by Van der Leeuw. Since the bias in this case was held to be of an impermissible kind, namely personal involvement in the merits of the case, the "reasonable suspicion" test was applied, and the question of departmental bias did not change the test. Furthermore, it appears as if Van den Heever J in *Loggenberg* applied the second inquiry proposed by Van der Leeuw: The court held that permissible departmental bias was in issue, and then stated

> "*There is no suggestion in the papers before us that Colonel Robberts has in fact - and in advance - made up his mind irrevocably against* [the] *applicants so that the inquiry will be an empty formality.*"[131]

Furthermore, in the case of *Administrator, Transvaal v Traub*[132] the court confirmed the order

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[131] *Loggenberg and others v Robberts and others* 1992 (1) SA 393 C at 406 A - B.

[132] 1989 (4) SA 731 A.

of the trial court, who specifically referred the matter back for re-decision by another official than the original decision maker, probably because the court held that, on the facts, there was a reasonable fear that the original superintendent may have been personally, in stead of just departmentally, biased.

In my opinion, the application of the test for administrative tribunals as proposed by Van der Leeuw is logical and sound, and should be applied. This argument can be supported by the substance of the findings in the last mentioned cases.

It is interesting to note that a slightly different approach is followed in the United States. In this country, as a result of its "due process" constitutional clause, an internal separation of powers is made between the executive bureaucrats and its adjudicatory administrative staff, to prevent an abuse of power and the possibility of unacceptable bias.[133]

3.5 DECISION TO RECUSE

Where a committee or board adjudicating a matter consists of more than one member, and there is a request for the recusal of one or more members, who should make the decision whether to accede to this request or not? The chair, the members who are involved, or the whole committee?

Rose Innes[134] submits that this is a question of fact to be decided by the board on the evidence before it, not a question of law to be decided by the chair. It is submitted that this view is correct, with the further requirement that those members who are involved in the allegations of bias, should be excluded from these deliberations.

In *Red Hill Garage and others v Buchan's Garage and another*[135] the applicants requested the

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[133] Mashaw JL, Merrill RA and Shane PM in Administrative Law - The American Public Law System. (3rd ed.) West Publishing: St Paul, 1992.

[134] Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 174.

[135] 1954 (4) SA 777 N.

recusal of M, one of the members of a licensing board, on the grounds of interest in the matter. The chair decided that the question was one of law, and then overruled the objection. The matter was taken on review. The court held that, due to the ouster of the court's jurisdiction, it could interfere with the decisions of the chair only where there was a manifest absence of jurisdiction. Since the applicants requested the chair's ruling on the manner, and at no time asked for the matter to be decided by the whole board, the court did not wish to interfere with the decision. (It went on to state that, notwithstanding the ouster of the court's jurisdiction, the matter of disqualification of one of the board members could be raised on review. The disqualification was, however, not proved to exist.)

The above case appears to substantiate the view that a decision for recusal should be taken by the whole committee, not only the chair, but that the applicant must request the body as a whole to determine such issue. Obviously, where no request for recusal was made at the initial hearing, possibly because of ignorance of the facts on which the appearance of bias could be based, the matter will be left for the courts to decide.

3.6 WAIVER OR ACQUIESENCE

Cockram[136] states that an affected individual may be taken to have agreed in advance to the participation of a person as adjudicator in proceedings on a matter on which he himself had to give evidence. In my opinion, this would amount to a waiver of the "reasonable suspicion" test for bias. These circumstances will usually occur in proceedings of voluntary associations, like the Jockey Club. (See, for instance, the case of *Marlin v Durban Turf Club*[137], discussed in 3.3.3 above.) It is unlikely that this type of waiver will be found where administrative tribunals are involved. Rose Innes[138] submits that even in these cases, an applicant has a right to demand that the decision maker considers evidence contrary to his own, pre-formed views, and is open to persuasion. In *Turner v Jockey Club of Southern Africa*[139] the appellant T had

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[136] Administrative Law. Juta: Cape Town, 1976 at 46.

[137] 1942 AD 112.

[138] Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 179.

[139] 1974 (3) SA 633 A.

been accused and convicted of bribing a fellow jockey to pull his horse wide in a race. The court held that the rules of the Club had the effect that a steward may, contrary to the normal rules, act as both witness and judge. However, the steward must still keep an open mind on the matter[140]. As to the question whether this was indeed the case, the court held that it was not:

> "[The fact that the alleged bribe was more than what T stood to win if he won the race] *was a consideration favourable to the appellant, and one would have expected a fair and impartial board to have considered it and dealt with it. Their failure to do so seems to be indicative of their continued bias against the appellant.*"[141]

The conviction was accordingly set aside.

Another example of waiver of the normal test for bias might be where the parties agreed to an arbitrator who is employed by one of the parties.[142] It is submitted that the rule expounded in *Turner* that the adjudicator must be impartial, and open to persuasion, still applies. Should a party be able to prove, on balance of probabilities, that this was not the case, the decision would not stand.

According to various writers on English administrative law[143] an individual would be deemed to have waived his objection to the exercise of jurisdiction on the grounds of bias if he did not raise this objection at the earliest opportunity after being in possession of all the facts leading to the appearance of bias. Should he fail do so, and acquiesce to proceed with the hearing, he can not challenge the finding on these grounds afterwards. However, this would not apply where the disqualified adjudicator failed to make a complete disclosure of his interest; or if the

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[140] at 646 B - C.

[141] at 653 D - E.

[142] This is one of the examples quoted by Conradie J in *Mönnig and others v Council of Review and others* 1989 (4) SA 866 C at 880 A - B, where the "real likelihood" test is still to be applied.

[143] See, for instance, Wade HWR in Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 430; De Smith SA in Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 260 - 261; Fazal MA in Judicial Control of Administrative Action in India and Pakistan. Clarendon Press: Oxford, 1969 at 167 - 171.

affected party was prevented by surprise to raise the objection at the correct time; or if he was unrepresented and did not know he had the right (duty) to object at that time.

Although the South African writers appear to be mute on the issue of waiver, it is submitted that the rule as applied in English Common law (set out in the previous paragraph), would also be applicable in South Africa. In the absence of special circumstances, such as surprise or ignorance, the fact that the party did not immediately object to the hearing of the matter by a particular individual or body, would normally be indicative that there was not a reasonable apprehension of the possibility of bias.

3.7 CONSEQUENCES OF DISQUALIFYING BIAS

The normal rule is that the presence of even one person who is disqualified, will vitiate the whole of the proceedings before any tribunal. This applies even where such person did not participate in the discussion, did not influence the proceedings in any way, did not vote or where her vote made no difference to the final result, or even if she completely abstained.[144] The reason for this result goes back to the basis of the rule against bias - that justice must also be seen to be done. It is fair to expect that every member of a decision maker will properly hear your case - if even one of them is disqualified, the reasonable fear might arise that this person would persuade or influence the others. Tribunals reach decisions after discussion of the relevant arguments and making use of one another's experience. Where one person is (possibly) biased, this process is faulty. Any decision reached by this tribunal, will be void. In the words of Conradie J[145]

> "*Although the presence or suspicion of bias has in the past been treated as an irregularity which could be overlooked if there was proved to be no prejudice to the aggrieved party, .. the tendency at present is to regard it as a vitiating failure of natural justice, the result of which is that what took place before the adjudicator is not so much as a defective hearing as no hearing at all.*"

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[144] Rose Innes LA in Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 186.

[145] In *Mönnig and others v Council of Review and others* 1989 (4) SA 866 C, at 882 G - H.

The number of impartial persons who voted for the issue would be irrelevant. In the English case of *R v Cheltenham Commissioners*[146] Williams J held that

> *"I am strongly disposed to think that a Court is badly constituted of which an interested person is a part, whatever may be the number of disinterested members...*[We] *cannot go into a poll of the Bench."*

This decision has been quoted with approval numerous times. It must be noted that this general rule appears to be different in the context of the local government ordinances. This issue will be discussed in section 4.5 below.

According to De Smith[147], the courts have also refused to enter into a discussion as to the extent of the influence exercised by the interested party. This appears to be the case in South Africa as well.

In English law, much debate centres about the effect of a finding of the presence of bias: whether it makes the original decision void or voidable. The answer is important because it determines what type of remedy - prohibition, certiorari or mandamus - the affected party can apply for. As we do not have the same rigid distinction between remedies in South African law - here the remedy is simply to apply for review - the issue is not locally contentious. Conradie J in the *Mönnig*[148] case held that the court needed to express no view on this. It is, however, submitted that the presence of impermissible bias renders a decision void *ab initio*. Obviously, it will have some effect or existence up to the time the court declares it void, in the sense that individuals modify their behaviour on the assumption that the decision is valid. However, an invalid decision is incapable of having any legal consequences and can not affect the rights or liabilities of the parties involved.

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[146] (1841) 1 QB Rep 467 at 478 - 479, as quoted by Fazal MA in Judicial Control of Administrative Action in India and Pakistan. Clarendon Press: Oxford, 1969 at 158.

[147] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 259.

[148] 1989 (4) SA 866, at 882 F.

Sometimes it is argued that a hearing before a properly constituted tribunal would have achieved the same result, and that the court should therefore not interfere.[149] However, this argument misses the whole point of judicial review - which is to have the matter reconsidered. One can not automatically assume that the decision taken at a properly constituted hearing will remain the same as a previous one. Indeed, as discussed in 3.3.3 above, where the court has grave doubts about the ability of the decision makers to reconsider the issue with open minds, the court will usually deviate from the normal rule not to interfere with the administration on the merits of the case, and substitute the tribunal's decision with its own. In practice, however, this does not occur often.

A further argument often raised where the original decision had been subject to an internal appeal process, is that such process validated the original procedural shortcomings. In *Mönnig and others v Council of Review and others*[150] the court analysed the matter, and then stated

> "*it is clear to me that, where the hearing in the lower tribunal is, by reason of partiality of its members, not to be regarded as a hearing at all, that defect must in principle be so grave as to be incurable.*"[151]

On appeal, this finding was confirmed.[152] Corbett CJ held that there was no basis upon which the Council of Review could have rectified the proceedings before the lower tribunal, other than by setting them aside.

Similarly, in *Turner v Jockey Club of South Africa*[153], Botha JA held that

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[149] See, for instance, Allars M in Introduction to Australian Law. Butterworths: Sydney, 1990 at 276 and the case there cited.

[150] 1989 (4) SA 866, at 882 G - 883F.

[151] at 883 E - F.

[152] *Council of Review, SADF, and others v Mönnig* and others 1992 (3) SA 482 A, at 495 C - D.

[153] 1974 (3) SA 633 A, at 655 C - D.

> "*Where the decision of an inquiry board is vitiated by a disregard of the fundamental principles of justice, the matter cannot be corrected by a remittal or by further evidence, or in any manner short of a hearing de novo, and the person affected can always seek redress in the ordinary courts of law.*"

Therefore, even where the matter went through an appeal process, unless the whole issue was reheard *de novo*, this process will not change the fact that the original decision was - and remained - invalid.

Successful litigation on the denial of procedural fairness can and does create administrative delays and extra costs for the taxpayer. All the more reason why officials should have a thorough grasp of the basics and application of the rules of natural justice.

3.8 DOCTRINE OF NECESSITY

A final issue that remains to be discussed in this section, relates to the doctrine of necessity. In the words of De Smith[154]:

> "*An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice.*"

According to Rose Innes[155], the doctrine of necessity is, however, not applicable where there is an objection against a particular tribunal, and another one can take its place by arrangement or appointment. Therefore, in *Rose v Johannesburg Local Road Transportation Board*[156] where all three members of the board were held to be disqualified, the applicant requested an order to the effect that the matter should be reconsidered by a board of which these three were not members. The court refused to give such an order, as it was within the power of the

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[154] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 262.

[155] Judicial Review of Administrative Tribunals. Juta: Cape Town, 1963 at 187.

[156] 1947 (4) SA 272 W.

Minister of Transport to make such appointments, and the court did not feel competent to interfere with these powers. However, the court issued an order restraining the three disqualified parties from hearing any matter in which the applicant was involved. Presumably the applicant would then have had to request the Minister to appoint a different board to deal with his applications.

In *Council of Review, SADF, and others v Mönnig and others*[157] the appellant argued that the disqualification of the relevant court martial would disqualify all military courts, which could not have been intended. The court held that this argument amounted to the "doctrine of necessity," which was not applicable, since the civil courts were vested with concurrent jurisdiction. In any event, the fear that all court martials would be disqualified had no basis, as the facts of the matter *in casu* was highly unusual.

Wade[158] provides us with other examples of where the doctrine of necessity was held to operate: The first is found in the famous case of *Dimes v Proprietors of the Grand Junction Canal*[159] where the Lord Chancellor was disqualified due to owning shares in the applicant company. However, the fact that he signed the order for the enrolment of the matter was held to be in order, as no one but himself had that power. The second example is almost synonymous with the necessity doctrine: In the *Judges v Attorney General for Saskatchewan*[160] the matter to be decided was whether the salaries of judges were subject to income tax. The Privy council held that no one else was competent to decide the matter. (Incidentally, the decision was adverse to the judges!) In *Jeffs v New Zealand Dairy Production and Marketing Board*[161] the board decided to allot the milk of a certain district to a company which already had the rights to process the cream of that district. The company owed money to the board. The decision was subsequently attacked on the grounds that the

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[157] 1992 (3) SA 482.

[158] Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 426 - 428.

[159] (1852) 3 HLC 759.

[160] (1937) 53 TLR 464.

[161] [1967] 1 AC 551.

board had a pecuniary interest in the matter. The Privy council refused to set the decision aside, since the statute allowed no other body to make these allotments.

Finally, both Wade[162] and De Smith[163] refer to the issue where a statute empowers a particular official (normally the Minister) to act. In these circumstances, even if he is personally interested, he would be the only one authorised to act. Even if he delegated the decision to a subordinate, it would not resolve the problem, since this subordinate will still act in the name of the Minister. Therefore, should he own property in a district and a development plan for this district comes before him for consideration, he would have to deal with it, albeit in an impartial and open minded way.

The court should, however, scrutinise the proceedings closely where the doctrine of necessity is applicable, to ensure that all involved got a fair hearing.

4. BIAS IN LOCAL GOVERNMENT DECISION MAKING

In the last part of this minor dissertation, the focus will move to local government decision making in particular.

4.1 INTRODUCTORY REMARKS

> "*...city councils have been viewed as both the representatives and guardians of the communities they serve. City councils were regarded as being subject to a type of public trust, which imposed special duties and standards on them, in the sense that they were required to exercise their powers in the public interest, not for their own advantage nor any other purpose.*"[164]

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[162] Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 427.

[163] Judicial Review of Administrative Action. (2nd ed.) Stevens & Sons: London, 1968 at 263.

[164] Burns Y, *Local Government and Administrative Law* in Verloren van Themaat Centre Local Government - The Demands, The Law, The Realities., a collection of papers delivered at a conference held in Pretoria on 30 August 1995. UNISA: Pretoria, 1996 at 68.

Councillors have always been allowed less freedom to act unfairly than their political counterparts at higher levels of government. Most of the common law rules relating to bias or the grounds for impermissible bias, had in fact been laid down in legislation; such conduct being prohibited. Several explanations can be forwarded for this state of affairs: As the courts held themselves unable to interfere in purely administrative decisions, and most local government matters were held to be purely administrative as opposed to quasi-judicial[165], the legislature probably decided to prevent unfair action at the very level of decision making where the possibility of personal interest and abuse was at its greatest, due to the nature of the decisions to be taken and the small size of the area of responsibility. The statutory prohibitions could also be seen as a clear indication to councillors, the trustees of the community, as to what was deemed to be acceptable behaviour, and what not. Councillors who contravened these rules, could be criminally prosecuted and punish. The statutory regulation of the rule against bias had a further advantage: A person contravening these sections of these rules could be criminally prosecuted - meaning that the risk of some unfair decisions being left standing purely because the affected member of the community had no funds to bring civil proceedings, was diminished.

It is generally accepted that the reason for these disqualifications is to prevent the conflict between a councillor's interest and his duty that may otherwise arise.[166]

In *Hack v Venterspost Municipality*[167] the objectives of these provisions were stated as follows by Roper J:

> " *..they are framed with the object of ensuring economy and honesty in the administration of local affairs, of eliminating, as far as possible, corruption in its indirect as well as its direct forms, and of maintaining public confidence in the purity of local administration.*"

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[165] See, for instance, *Jooma v Lydenburg Licensing Board* 1933 TPD 477.

[166] *Olley v Maasdorp* 1948 (4) SA 657.

[167] 1950 (1) SA 172 at 184.

The relevant statutory requirements will now be discussed and thereafter illustrated with reference to case law.

4.2 RELEVANT LEGISLATION

The following legislation is at present relevant to the issue of bias in local government decision making: Sections 10H, 16(7) and Schedule 7 item 2(c) of the Local Government Transition Act, no 209 of 1993; section 30 of the Municipal Ordinance (Cape), no 20 of 1974; sections 38 - 41 of the Local Government Ordinance (Transvaal), no 17 of 1939; section 49 of the Local Government Ordinance (OFS), no 8 of 1962; and sections 33 and 93 - 95 of the Local Authorities Ordinance (Natal), no 25 of 1974.

The relevant sections from the recently amended Local Government Transition Act will now be summarised. Due to space constraints, only the relevant sections of the Cape Municipal Ordinance will be discussed thereafter. However, since the Provincial Ordinances are by and large similar, the same principles would apply in the other provinces. The Act and Ordinance are not completely compatible. An attempt will be made as to clarify how they should be interpreted.

4.2.1 THE LOCAL GOVERNMENT TRANSITION ACT, NO 209 OF 1993

Section 10H, which was introduced in an amendment promulgated on 22 November 1996 provides for the prohibition of certain acts by council members, employees and others. In the discussion of the section, the focus would be on the conduct of council members, being the ultimate decision makers.

The section can be summarised as follows:

1. A council member needs the consent of the council in four circumstances:

a) to accept any remuneration from outside parties for anything done or not done related to her functions as councillor;

b) to enter into transactions with the council - other than renting accommodation from the council or obtaining public services (e.g. electricity and water);

c) to perform paid work (other than councillor duties) for the council; or

d) to appear on behalf of a third party before the council in a private capacity.

Without this consent, the council member must pay any monies made in this regard to the council. (Subsection (1) and (2)).

2. A council member needs the prior consent of the council to become involved, directly or indirectly, in a contract with the municipality, or share in the profits or losses of a such a contract, or obtain any financial interest in municipality business. Where more than 20% of council members fail to approve the foregoing, the MEC will make the final decision. Failure to obtain this consent is an offence. (Subsection 3(b)).

3. A council member must disclose to council whenever her spouse, partner or spouse's partner, employer or spouse's employer becomes involved, directly or indirectly, in a contract with the municipality, or share in the profits or losses of a such a contract, or obtain any financial interest in municipality business. Failure to do so is an offence. The council must submit such details to the MEC for consideration. (Subsection 3(c)).

4. A council member must declare to council any material interest in any new contract that the council wants to enter. Such member must withdraw when the matter is discussed and may not vote thereon. Failure to do so is an offence. The declaration must be recorded in the minutes. (Subsections 3(d)(i) and (e)).

5. A council member must declare to council whenever she becomes materially interested in an existing contract with the council. Failure to do so constitutes an offence. The declaration must be recorded in the minutes. (Subsection 3(d)(ii) and (e)).

6. The offences set out in the previous four paragraphs carry a penalty on conviction of a fine or imprisonment for a period not exceeding 12 months. (Subsection 3(f)).

7. The MEC, on receipt of allegations of corruption, fraud or maladministration that justify further action, must appoint a commission of inquiry or other person to inquire into or investigate the matter. After consideration of the report from the investigating body, the MEC

may take such steps as he or she may deem necessary to deal with the matter. (Subsection (4)).

Item 2(b) of Schedule 7 (Code of Conduct for Councillors) prohibits a councillor from influencing or attempting to influence the council of which she is a member on any matter serving before it so as to gain some direct or indirect benefit, whether in money or otherwise, for herself or any person to whom she is related or any person or body with whom she is associated.

Section 16 (7) provides that any councillor who contravenes or fails to comply with any provision of the Code of Conduct is guilty of misconduct, and his or her membership may, on application by the transitional council concerned or any member of such council, be terminated by the High Court.

4.2.2 THE MUNICIPAL ORDINANCE (CAPE), NO 20 OF 1974

Section 30 provides that certain conduct by councillors amount to offences. The relevant prohibitions are the following:

1. A councillor may not directly or indirectly demand, accept or try to obtain (whether for herself or someone else) any consideration - other than her allowance - for doing or not doing anything in her capacity as councillor. A contravention is an offence, punishable with a maximum fine of R1000 or two years imprisonment or both. (Subsection (1))

2. A councillor may not be present at a meeting, or stay in the room where the meeting is held, when a matter in which she, her spouse, partner or business associate has a direct or indirect pecuniary interest.

Merely being a director, shareholder, employee or agent of a registered company or co-operative is not seen as a pecuniary interest, except

- in the case of a private company; or
- where the councillor (plus spouse and minor children) controls more than 5% of the shares or stocks.

A councillor who is a member or executive member of a charity or other public body, who

receives a grant from the council or a loan in respect of immovable property where ownership shall revert to the council, or a school who receives aid from the council in connection with boarding facilities, is not deemed to have a pecuniary interest in such grants or loans.
A contravention is an offence, unless the councillor can prove that she did not know of such interest. (Subsection (2)).

3. A councillor may not act as attorney or advocate against the council in any litigation or arbitration in which the council is involved. This is an offence. (Subsection (3)).

4. A councillor may not, by herself or through a spouse, partner or business associate, have a direct or indirect pecuniary interest in a contract or the benefits of a contract with the council entered into after her election. (Subsection (3A)(a).)
The following contracts are exempted from this prohibition:
a. A contract with a registered company or co-operative where the councillor, her spouse, partner or business associate is merely a director, shareholder, employee or agent, except
- in the case of a private company; or
- where the councillor (plus spouse and minor children) controls more than 5% of the shares or stocks.
b. A grant to a charity or a loan in respect of immovable property for any other public body, where ownership shall revert to the council, or aid to a school in connection with boarding facilities, where councillors are members of these bodies.
c. Purchase or lease of anything sold or leased by the council by public competition.
d. Purchase by the council of anything at an auction sale.
e. Supply of goods and services rendered to public at large at a fixed charge.
f. Private purchase of land sold by council at an upset price and subject to conditions approved by the Administrator.
g. Approved housing loan under Housing Act.
h. Any contracts which together amount to less than R1000 in amount in any year.
i. Any contract exempted by the Administrator, on application by the council. (The detail of such contract must be advertised, and all objections received forwarded to the Administrator.) (Subsection 3A(b)).

A contravention is an offence, unless ignorance is proved.

As soon as the town clerk becomes aware of any possible contravention, he must report the matter to the Provincial Secretary. A councillor convicted of these offences becomes disqualified to be a councillor, and therefore looses her seat. (Section 25(2)(g)(i) read with section 26(1)(d).)

4.2.3 RECONCILING ACT AND ORDINANCE

As the Local Government Act (the Act), as amended, did not repeal any sections of the Cape Municipal Ordinance (the Ordinance), the normal rules of interpretation apply. One must therefore attempt to give such meaning to the two sets of sections that both are operative, as far as possible. Only where there is a direct conflict between the two, will the national legislation prevail. Those sections where it is difficult (or impossible) to reconcile the Ordinance and the Act, will now be discussed.

4.2.3.1 BRIBERY

The courts have interpreted 30(1) of the Ordinance to mean that demanding, taking or accepting bribes is an offence,[168] although the section itself can be read wider. (Different from the other ordinances, the word "corruptly" is not used.) Section 10H(1)(a) of the Act provides that a councillor needs the consent of the council to accept any rewards from outsiders. It is clear that the purpose of the amending section was to allow councillors to keep, for example, gifts from grateful members of the community given in good faith without being prosecuted, provided that the matter was brought to the attention of the council, and they approved. Failure to do so, however, is not an offence, but the relevant councillor must pay the money over to the council. It is hardly likely that a councillor who had been bribed, will put the matter before the council. And this is where the problem lies with the new amendment - if X received a bribe and did not inform council (or had the *chutzpa* to inform, but council did not approve), is it still an offence - which s10H(1)(a) does not provide for - or must X merely transmit the bribe on being caught? X will argue that s10H overrides s 30, and that her conduct was not an offence, at least not in terms of local government legislation.

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[168] The relevant case law will be discussed in section 4.3 below.

(The prosecution will have to rely on the common law or other anti-corruption legislation.) It is submitted that this is an omission in the Act, which must be rectified. In the interim, s 30 could be read with s10H to state that, accepting a reward, *without the consent of council*, is an offence. The bribe amount must also be forwarded to council. (Similar to a compensatory fine, in addition to the normal penalties.)

4.2.3.2 COUNCILLOR INVOLVED IN CONTRACTS WITH COUNCIL

The Ordinance prohibits all contracts between council and councillor herself, with a few exceptions. Contravention is an offence. (s 30(3A)).

The Act classifies what could be seen as contracts into three categories:

a) transactions with the municipality - other than for normal municipal services (s10H(1)(b));

b) performing paid work for the municipality (s10H(1)(b); and

c) other contracts (s10H(3)(b)).

The consent of council is needed for all three categories. The lack of consent does not make the first two categories offences, but would result in the paying over of monies to the council, whilst the lack of consent in the third category would constitute an offence.

What is the difference between "contract" and "transaction"? Since the consequences of entering into a transaction without consent differs from that of entering into a contract without consent, the question must be answered. The Act provides no definitions. Presumably "transaction" refers to a small, single piece of business, like the buying or selling of a computer. (See s 10H(3)(a), where reference is made of transactions of purchase, sale, hire, or lease.) "Contract" could refer to a longer term relationship, with substantial financial repercussions. May be contracts must go out on tender (whether formal or informal), and transactions not. As the section reads, the courts unfortunately will have to make the final interpretation.

One purpose of the amending section was, in my opinion, to delegate the function of approval of contracts, which under the Ordinance, was previously left to the Administrator, to councils

themselves, at least where they are 80% in agreement on the issue.

It appears that s10H qualifies s 30, in that only where particular contracts were entered into (without consent), would an offence be committed.

4.2.3.3 (COUNCILLOR'S) SPOUSE, PARTNER OR EMPLOYER INVOLVED IN CONTRACTS WITH COUNCIL.

The Ordinance prohibits all contracts between the council and a councillor's spouse, partner or business associate, with a few exceptions. Contravention is an offence. (s 30(3A)).

The Act merely prescribes that a councillor must disclose when her spouse, partner/partner's spouse, or employer/spouse's employer becomes involved in a council contract. Non disclosure is an offence. The details must be submitted to the MEC for consideration. (Not, apparently, for approval). What the validity of such a contract would be, is unclear, although it appears that it will be valid, since it is not expressly prohibited. What the role of the MEC is, is also unclear. It is, however, doubtful that she could forbid/cancel such a contract, since it is not subject to her approval. The purpose of the amending section appears to be to promote increased transparency and disclosure on the one hand, and de-criminalising contracts with close associates of a councillor, on the other hand.

In my opinion, a councillor will now only be guilty of an offence where she failed to disclose that one of the parties listed had an interest in a contract, and s 30 must therefore be given a restricted interpretation.

4.2.3.4 PECUNIARY INTEREST - RECUSAL FROM COUNCIL MEETING

The Ordinance provides that a councillor may not be present at a meeting, or in the room, when the following matters are discussed or voted on, or may not move a motion on one of the following:

- any matter in which she has a direct or indirect (herself, or through her spouse, partner or business associate) pecuniary interest;
- any pending legal or arbitration proceedings against the council, in which she has a direct or indirect (herself, or through her spouse, partner or business associate) pecuniary interest.

A contravention is an offence. (s 30(2)).

The Act only prescribes withdrawal from a council discussion when a councillor has a material interest in any new contract that the council wants to enter into. This must first be disclosed. Failure either to disclose, or to withdraw, amounts to an offence. (s 10H(3)(d)).

These sections are easily reconcilable, although the ambit of the Ordinance is much wider. It is submitted that councillors, whenever they may have a financial interest in a matter to be discussed, must disclose such interest and then exit the room where the meeting is held.

Note that item 2(b) of the Code of Conduct prohibits a councillor from influencing the council on any matter serving before it in order to gain any benefit, in money or otherwise. Due to the inclusion of non pecuniary matters, this prohibition is wider than that of the Ordinance. The consequences differ, though: contravention of the Code is not an offence, but misconduct which can lead to loss of membership by order of the High Court.

4.3 DISCUSSION OF CASE LAW

4.3.1 BRIBERY

A spate of bribery cases against municipal councillors - especially those of Pretoria City Council - were reported in the 1950's. Thereafter, only a few such cases made their way into the law reports. It remains a matter of speculation whether this is because corruption amongst councillors have declined.

The courts have dealt harshly with councillors convicted of taking bribes. In *R v Fourie*[169] the accused, who pleaded guilty, appealed against a sentence of imprisonment with hard labour without the option of a fine. The accused was a first offender. Although the court stated that it found it unpleasant to send the accused to jail, it held that it could not fail in its duty towards the state and community. The sentence was upheld. Similarly, in *R v Preller*[170] a sentence of

[169] 1951 (4) SA 157 T.

[170] 1952 (4) SA 453 A.

three month's imprisonment without the option of a fine was upheld. Greenberg JA quoted the following words of the trial judge with approval:

> "*..there is, of course, the greatest importance that municipal government should be kept clean and free of bribery and corruption because not only does corruption in municipal government result in inefficiency and injustice in municipal affairs, but it discourages decent and respectable citizens from taking a leading part in municipal politics. It is well known that corruption is very difficult to detect and bring to light and, therefore, when it is discovered and brought home to anybody the penalties should be severe.*"

4.3.2 CONTRACTS WITH THE COUNCIL

Some examples where councillors were disqualified as a result of contracts with the council, are the following:

- a councillor/auctioneer renting stock fair kraals from the council;[171]
- a councillor leasing grazing from a council;[172]
- a councillor leasing an area of the commonage;[173] (Here the council obtained exemption from the Administrator for the concluding of the contract. When the councillor later stood for re-election, however, he failed to apply for exemption again and was disqualified.)
- a councillor/attorney (but not conveyancer) attending to the transfer of property from the municipality to a purchaser, despite being appointed by the purchaser and agreeing to work free of charge;[174]
- a councillor/butcher leasing store rooms at the municipal abattoir;[175] (Held to be a special relationship which set the councillor apart from the ratepayers as a whole.)
- a councillor in receipt of a loan from the municipality for the financing of expenses in

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[171] *Scholtz v Labuschagne* 1929 CPD 430.

[172] *McLean v Lawrence, NO* 1949 (4) SA 1016 E.

[173] *Oberholzer v Neethling NO and others* 1958 (1) SA 564 E.

[174] *Burger v Botha* NO 1972 (4) SA 569 K.

[175] *Morland v Niehaus* 1973 (1) SA 240 K.

connection with the rewiring of certain buildings.[176]

The following situations were held not to amount to prohibited contracts with the council:
- payment of a honorarium of £525 to a civil engineer/councillor in respect of professional services rendered to the council during arbitration proceedings;[177]
- the appointment of a councillor/surveyor by the council's attorneys to act as expert witness in a case and render certain services in connection with the collection of evidence;[178]
- a councillor who has been granted a concession, in common with other members of the community, to establish a cattle post on the commonage and to farm there with sheep.[179]

4.3.3 PECUNIARY INTEREST

Cases abound on this topic. Only a selection will be discussed.

In *Olley v Maasdorp and another*[180] a firm of surveyors in which a councillor's husband was a partner, had a serious of executory contracts of employment with the Municipality. The issue was whether such councillor had a "direct or indirect pecuniary interest in any contract with the council." The councillor was married out of community of property. The court stated that a person has a pecuniary interest in a contract

> *"if he is so concerned with its existence or performance, or in other words so circumstanced with respect to it, that his financial position is affected by it either beneficially or detrimentally."*[181]

The court continued and said that the distinction between a direct and an indirect interest was

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[176] *Van Tonder v Niehaus* 1973 (1) SA 246 K.

[177] *Ohlsson and others v The Municipal Councils of Claremont and Woodstock and James Bisset* 1901 CPD 63.

[178] *Adendorp Municipality v Setzkorn* 1960 (4) SA 85 E.

[179] *Bredenkamp en 'n ander v Van der Westhuizen en andere* 1968 (4) SA 358 GWPA.

[180] 1948 (4) SA 657 A.

[181] at 665.

not clear, but that the disqualification extended beyond the parties to a contract. The meaning of the words "indirect pecuniary interest" should not be limited. Watermeyer CJ accordingly held that a wife had a financial interest in the adequacy of her husband's income, as they had to share household expenses and he was bound to maintain her.

In *Hack v Ventersdorp Municipality and others*[182] the facts were as follows: N was the mayor and chairman of the licensing committee. He was employed as general manager by WA Ltd, a subsidiary of NM Ltd. These two companies owned three shops, and were entitled to the rentals thereof. Some of the sub-lessees of these shops objected to the granting of a general dealer's licence applied for by H. Following on a refusal of such a licence by the licensing committee, H took the decision on review, arguing that the mayor had been disqualified from adjudicating since his employer had a pecuniary interest in the issuing of the licence. The court held that a landlord does have a pecuniary interest in the exclusion of competitors of his lessees. As the mayor had thus been disqualified, the decision was set aside. On an alternative ground of possible personal bias of the chair, Roper J found that he could not interfere, since, although he disagreed, he was bound by a long line of cases which held that functions of local authorities were of a purely administrative nature.

The above decision was confirmed on appeal to the full bench and the appellate division.[183]

In *S v Botha,*[184] councillor B had been the auctioneer in a sale of a council erf. The purchaser subsequently wanted to cancel the contract of sale on the grounds of misrepresentation. When the matter was discussed by the council, another councillor suggested that B withdrew from the meeting, since he had a pecuniary interest in the completion of the sale. After obtaining advice from the Town Clerk to the effect that this wasn't necessary, B refused to withdraw. He was convicted of a contravention of the ordinance, which conviction was upheld on appeal. It was held that he had foreseen the possibility of a conflict of interests, and was not unaware

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[182] 1950 (1) SA 172.

[183] *Berzansky v Hack* 1950 (3) SA 358 T; 1951 (2) SA 382 A.

[184] 1978 (2) SA 544 NC.

of the prohibition.

In *S v Adrus*[185] a councillor was present at a meeting where unanimous resolutions were passed regarding lists of the allotment of erven. His name appeared on all the lists. An argument that the prohibition was not applicable because there had been no vote, was rejected, and the matter remitted to the magistrates' court for sentencing.

It is clear that the courts have given a very wide meaning to the term "indirect pecuniary interest." The objective at all times, was to remove the possibility of conflict between personal interest and duty as councillor.

4.4 CONSEQUENCES OF DISQUALIFICATION

As discussed in section 3.7 above, the normal rule under common law is, that where any single member of the decision maker had been disqualified, the decision will be set aside. Similarly, in *Hack v Venterspost Municipality*[186] Roper J held that

> "*It is I think clear from the authorities that even if* [a disqualified person] *does not vote, the mere presence of an interested person as member of the committee is sufficient to vitiate the proceedings.*"

Unfortunately this situation had been somewhat complicated by the introduction of section 59 (3) of the Cape Municipal Ordinance, no 20 of 1974. (The other three Ordinances have got similar provisions) This section reads as follows:

> "*Any defect in the election, appointment or qualifications of any councillor...of a council shall not invalidate the proceedings of such council or a committee thereof or any acts of such councillor ... in relation to such proceedings.*"

In *Woods v East London Municipality and others*[187] 11 councillors (out of a council of 16)

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[185] 1987 (1) SA 772 T.

[186] 1950 (1) SA 172 W at 192.

[187] 1974 (4) SA 541 E.

voted for a resolution to institute defamation proceedings against the publisher and editor of a daily newspaper. In terms of the resolution, the legal costs of the proceedings were to be carried by the council, with a proviso that, should they recover any compensation, the individual councillors will reimburse the council for their share of such costs. The editor sought an order declaring the said resolution void, in that it contravened the prohibition against voting on matters of pecuniary interest. Kotze J held that the councillors definitely possessed a pecuniary interest. He concluded that the effect of the prohibition was to render a vote cast by a disqualified councillor invalid. The respondents then argued that the resolution was protected by s 65(3), the predecessor of the section quoted above. The court rejected this argument, stating

> "*.. 65(3) is in terms designed to protect the validity of council proceedings affected by the participation of councillors in respect of whose election, appointment or qualification there is a blemish. It does not operate to protect business transacted at a meeting, like the one at issue in this application, which was at no stage properly constituted by reason of the absence of a quorum.*[188]"

Ex contrariis, where there was a quorum of qualified councillors, the fact that some other councillors who were disqualified voted, would not invalidate the decision. In these circumstances, this section clearly changes the common law. Under common law, the presence of even one disqualified person invalidates the decision as a whole. The relevant sections in the Ordinances thus create a contradictory policy - of forbidding a person to act where he has a disqualifying interest, but of validating his action if he should do so.[189]

According to Wade[190] the English courts deal with this contradiction by using the restrictive construction of "technical disqualification." They will uphold a decision if it is merely shown that the relevant councillor technically fell within the disqualifying provisions. However,

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[188] at 549 - 550.

[189] Wade HWR Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 429, referring to similar provisions in the English Local Government Act.

[190] Administrative Law. (5th ed.) Clarendon Press: Oxford, 1982 at 429.

where there was, in addition, the probability of bias, the decision will not be upheld. This shows the courts' reluctance to condone non compliance with the rules of natural justice.

Section 59(3) of the Ordinance may well lead to a decision being deemed valid where one or two disqualified councillors (not affecting the quorum) actively promoted the issue and voted thereon, thereby influencing the other councillors. It is exactly this danger of influence that the common law recognises in vitiating the decision as a whole. In my view, this section could be deemed unconstitutional, since it may lead to procedurally unfair administrative action being protected. Although I can see the practicality of protecting council decisions from invalidity, I am not convinced that it would always amount to a reasonable and justifiable limitation of what is, after all, a fundamental right. The English law solution, of still checking for (the probability) of impermissible bias, before sanctioning non compliance, makes a lot of sense. In my opinion, this would be a reasonable exception to the normal rule that the appearance of bias is sufficient to invalidate. It ensures proportionality between the importance of upholding most council decisions in the interests of certainty and the avoidance of expenses, on the one hand; and the right to get a fair hearing from the administration on the other hand.

5. CONCLUSION

Whereas the *nemo iudex in sua causa principle* is fairly clear in South African law, some questions remain to be answered or addressed.

At the earliest opportunity, the courts should take a bold step and change the common law in asserting that the rules for fair procedure are also applicable to purely administrative decision making. Since the underlying reason for the reluctance to interfere in administrative actions originated in the doctrine of sovereignty of Parliament, which is no longer applicable in our country, there seems to be little reason to cling to the notion that judges should interpret law, not create law. If our courts were bold enough to incorporate the doctrine of legitimate expectations almost in one fell swoop, the abolishment of the distinction between purely administrative and quasi-judicial action in no uncertain terms should not be so overawing. It can just lead to greater fairness in the decision making process, which will improve public trust

in the administration. The alternative would be to develop the constitutional right to just administrative action, and clarify the principles of fair procedure in the Administrative Procedure Act that is in the making. However, since there could be times when the Constitutional right is limited or suspended, I would still be more comfortable if the rules of fair play under all circumstances were part of the common law.

Such a step will also terminate the confusion whether or not the common law principles, specifically those relating to the grounds for the appearance of bias, is also applicable to all local government decision making. Should I, as councillor, be allowed to take part in a decision regarding whether or not my child should be granted permission to deviate from the town planning scheme? (Traditionally seen as a purely administrative matter.) If I do take part, will such decision be valid? These questions need to be answered - in my opinion in the negative. I suggest that the same common law rules should apply to all types of decisions.

The test for bias, and its applicability to administrative tribunals which may be departmentally biased, must be clarified. The retention of the "real-likelihood test" to deal with these issues, as proposed by Conradie J in the *Mönnig* case, should not be supported. Where only departmental bias is at stake, the courts should just check that the adjudicators did not fail to keep an open mind or to stay open to persuasion. Where departmental bias is combined with another, impermissible ground, such as personal dislike or prejudice, the courts should still apply the "reasonable suspicion" test.

Under certain, exceptional cases, it may still be useful to have to determine the probability of bias. This might be the case, for example, where the legislature wishes to protect local government decisions from being set aside too easily. (Although it does not make much sense to prohibit something on the one hand, and yet condone it on the other hand.) Where a councillor was only technically disqualified when a decision was taken, the decision may be allowed to stand, despite the common law rule to the contrary. However, where it was likely that such councillor was biased, the decision should not hold. The starting point, however, should be that no deviation from the basic principles of natural justice should easily be allowed. I would much rather have a couple of unfair (or perceived to be unfair) decisions set

aside, creating some extra costs for the administration - and therefore the tax/rate payer - than have to live with blatantly unfair decisions.

Finally, the legislation applicable to local government employees in particular, should be redrafted in a holistic, not piecemeal, manner. It is almost impossible for a lawyer to read the provisions of the Local Government Transition Act together with that of the Provincial Ordinances on Local Government, and try to reconcile the differing nuances. I have no doubt that a lay person/council member would not even begin to attempt the task - yet those same provisions could adversely affect such councillor in a serious manner. The drafters of the most recent amendment Act would be able to learn a lot from the drafters of the Constitution and the new Labour Relations Act: Legislation, after all, is applicable to the people, not all of whom are literate. It should thus be drafted in such an easy, user friendly way that ordinary people are able to read it. Fair administrative action begins by laying down the rules in a language every one can understand.

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